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THE importance of the faculty of the Yale School of Law in the growth of the JOURNAL is manifest in the many products of their scholarship which have been published in its pages. Their influence in the gradual development in quality of the student sections is less evident but nonetheless very real. In marking the fiftieth year of publication of the JOURNAL, the editors feel privileged to devote the article and book review sections of this issue to contributions from some of their teachers.

THE LIABILITIES OF THE IRREGULAR INDORSER

AN irregular (or anomalous) indorser is a person not otherwise a party to a negotiable instrument who places his signature in blank upon the instrument before delivery. For more than a century before the adoption of the Negotiable Instruments Law, the liability he incurred proved an enigma to the courts.[1] Ordinarily he was an accommodating party whose purpose in signing was to induce a lender to extend credit to a borrower;[2] and like

1. It became common in France in the eighteenth century for an accommodating party to write his name on the back of a negotiable instrument, or under the signature of the party accommodated. Such an accommodating party was called an *aval*, and the French law was quick to fix his liabilities. See POTHIER, TRAITÉ DU CONTRAT DE CHANGE (1809) 28, 75, 181, 182. The *aval* has not been recognized in English law, BYLES, BILLS OF EXCHANGE (20th ed. 1939) 173. But see Robinson v. Mann, 31 Can. S. C. R. 484 (1902); Grant v. Scott, 59 Can. S. C. R. 227 (1919).

2. One may be an accommodating indorser without being an irregular indorser. See Mechanics Bank v. Katterjohn, 137 Ky. 427, 125 S. W. 1071 (1910), where the ac-

other accommodating parties he assumed an obligation the extent of which was not discernible from the instrument itself. If the instrument were dishonored at maturity, his signature clearly made him liable to subsequent holders for value, all of whom presumably had relied upon the presence of his signature when they gave value for the note or bill.[3] But only extrinsic evidence could explain the full scope of his undertaking. Commonly it divulged his intent to lend his name to the maker of a note or the drawer or acceptor of a bill, and thus to increase the instrument's marketability. And one who agreed to become the payee of the note or bill relied on the additional security given the instrument by his signature. To such a person, although a party whose indorsement normally preceded his own, the irregular indorser was also liable.[4] On the other hand, the evidence sometimes revealed that the payee was the person for whose accommodation the irregular indorser signed, in which case he was manifestly not liable to the payee.[5]

When it had been determined, by means of parol evidence, to whom the irregular indorser had contracted an obligation, the courts had to decide the further question of the content or terms of his obligation. It was the latter question which proved to be the source of most confusion.[6] The location of his signature on the back of the instrument gave rise to an immediate presumption that he was an indorser; and like an indorser he obligated himself to subsequent holders. But the second function of an indorser, that of transferring title to another, he could not fulfill because he never had title to the instrument, and his signature was wholly superfluous in the transfer of title from one holder to another.

Since he could not be fitted into the category of an ordinary indorser, most courts refused to confer upon him the ordinary indorser's privileges, foremost of which is complete discharge from any obligation if the instrument is not presented to the primary debtor at maturity and if prompt notice of dishonor is not given the indorser.[7] A majority of courts, prior to the Negotiable Instruments Law, held that since he was never an obligee on the instrument and was a party to it before the payee, he should be liable as a co-maker.[8] Others argued that the position of his signature and the fact that he did not participate in the consideration made it clear that he was

commodating party was made the payee of a note which he immediately indorsed. Though made purely to accommodate the maker, the indorsement was regular.

3. BIGELOW, BILLS, NOTES AND CHECKS (3d ed. 1928) § 251.

4. *Id.* §§ 252, 253.

5. *Id.* § 253a.

6. The confusion of the English courts was just as great. See 2 AMES, CASES ON BILLS AND NOTES (1894) 839. See also Steele v. McKinlay, 5 App. Cases 754 (1880); Jackson v. Hudson, 2 Camp. 447, 170 Engl. Rep. 1213 (1810).

7. 2 DANIEL, NEGOTIABLE INSTRUMENTS (7th ed. 1933) §§ 637, 1123.

8. Good v. Martin, 95 U. S. 90 (1877); Rey v. Simpson, 22 How. 341 (U. S., 1859); First Nat. Bank v. Payne, 111 Mo. 291, 20 S. W. 41 (1892). See 2 DANIEL, NEGOTIABLE INSTRUMENTS (7th ed. 1933) § 803, where the cases are collected.

not a maker; consequently he must be assumed to be a guarantor or surety.[9] The trouble with each of these views was that it usually imposed upon the irregular indorser an obligation different from the one he intended to assume.[10] One who meant to be bound as co-maker, guarantor, or surety did not make himself ostensibly an indorser. Recognizing this, some courts found him to be a second indorser, the payee being the first.[11] But this view also disregarded the intent of the parties, since it left the irregular indorser free from liability to a payee who had demanded his signature as a condition precedent to accepting the instrument from the borrower.

Most courts, appreciating the weaknesses of their positions, allowed parol evidence to overcome their presumption that he was liable in a particular capacity.[12] In New York, which presumed him to be a second indorser, the payee was permitted to show an agreement that the irregular indorser be liable to him; and if he established this fact, the court indulged in the pretense that the payee indorsed without recourse to the irregular indorser, who negotiated the instrument back to him and was therefore liable to him, as well as to subsequent holders.[13] This reasoning was tortuous and fictional, but it at least had the advantage of more nearly carrying out the intentions of the parties. Other courts, however, were unwilling to sanction a comparable flight of fancy, with the result that their presumptions were almost always conclusive, since it was only in rare cases that the parties had made an agreement sufficiently explicit to overcome the existing presumption.[14]

Parol evidence, in effect, was competent to resolve only one aspect of a two-fold problem. Even in New York the result of allowing it to be shown that an irregular indorser was a first, rather than the presumed second indorser, was only to enlarge the number of parties to whom he was obligated; the nature of his undertaking, that of an indorser, hence a party only contingently liable, was not affected. It was to the end of making uniform the character of the irregular indorser's undertaking that the relevant sections of the Negotiable Instruments Law were directed.

9. Fullerton v. Hill, 48 Kan. 558, 29 Pac. 583 (1892); First Nat. Bank v. Babcock, 94 Cal. 96, 29 Pac. 415 (1892); Killian v. Ashley, 24 Ark. 511 (1867). See 2 DANIEL, NEGOTIABLE INSTRUMENTS (7th ed. 1933) § 804.

10. See Comment (1910) 23 HARV. L. REV. 396. An additional flaw in this theory is that a guaranty is not negotiable; consequently the "guarantor's" liability should not extend to later holders. See 1 AMES, CASES ON BILLS AND NOTES (1894) 225, n. 1.

11. Perry v. Friend, 57 Ark. 437, 21 S. W. 1065 (1893); Neal v. Wilson, 79 Ga. 736 (1887); See 2 DANIEL, NEGOTIABLE INSTRUMENTS (7th ed. 1933) § 805.

12. See Comment (1910) 23 HARV. L. REV. 396.

13. Coulter v. Richmond, 59 N. Y. 478 (1875); Moore v. Cross, 19 N. Y. 227 (1859); Hall v. Newcomb, 7 Hill 416 (N. Y., 1844). See NORTON, BILLS AND NOTES (4th ed. 1914) 185-187. There was no circuity of action, since the payee, although preceding the irregular indorser, was not obligated to him. See Wilkinson v. Unwin, 7 Q. B. 636 (C. A., 1841).

14. In New Jersey an irregular indorsement created no presumption of any kind. Elliott v. Moreland, 69 N. J. L. 216, 54 Atl. 224 (1903).

THE NEGOTIABLE INSTRUMENTS LAW

The N.I.L. refers specifically to the irregular indorser in Section 64, which provides:

> "Where a person, not otherwise a party to an instrument, places thereon his signature in blank before delivery, he is liable as an indorser, in accordance with the following rules:
>
> 1. If the instrument is payable to the order of a third person, he is liable to the payee and to all subsequent parties.
> 2. If the instrument is payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer.
> 3. If he signs for the accommodation of the payee, he is liable to all parties subsequent to the payee."

The most important contribution of Section 64 is that it fixes conclusively the nature of the irregular indorser's obligation.[15] Its plain meaning is to vest him with all the privileges and immunities, and to subject him to all the liabilities, of an ordinary indorser. Most courts understood at once that the rule was formal and that parol evidence was not admissible to show an intent to be bound in any other capacity.[16] The reluctance of some courts to forsake long-honored rules, however, has induced decisions which interpret the statute as creating only a rebuttable presumption that the irregular indorser is liable as an indorser,[17] or as fixing a conclusive obligation only with regard to subsequent holders for value.[18] These cases contradict the

15. Section 64 was fashioned after the California Code, which was chosen because "It is conclusive to certainty and appears to accord more nearly to what must have been the intention of the parties." Rule 2 was not in the California Code. CRAWFORD, ANNOTATED NEGOTIABLE INSTRUMENTS LAW (4th ed. 1916) 124.

Section 56 of the English Bills of Exchange Act provides: "Where a person signs a bill otherwise than as drawer or acceptor, he thereby incurs the liabilities of an indorser to a holder in due course." For illustrative English cases since the adoption of the B. E. A., see McCall Bros. v. Hargreaves [1932] 2 K. B. 423, 49 L. Q. Rev. 5 (1933); McDonald & Co. v. Nash & Co. [1924] A. C. 625; Jenkins v. Coomber [1898] 2 Q. B. 168.

16. Ingalls v. Marston, 121 Me. 182, 116 Atl. 216 (1922); Baumeister v. Kuntz, 53 Fla. 340, 42 So. 886 (1907); Lightener v. Roach, 126 Md. 474, 95 Atl. 62 (1915). And an allegation and evidence of the irregular indorser's intention to be liable to the payee are unnecessary. Far Rockaway Bank v. Norton, 186 N. Y. 484, 79 N. E. 709 (1906); Wilson v. Hendee, 74 N. J. L. 640, 66 Atl. 413 (1907); Miller v. Hockley, 80 F. (2d) 980 (C. C. A. 4th, 1936). The cases are collected in BRANNAN, NEGOTIABLE INSTRUMENTS LAW (6th ed. 1938) 784.

17. Hardy v. Ouachita Nat. Bank, 165 Ark. 532, 265 S. W. 74 (1924); Van Kleeck v. Channon, 175 Ill. App. 626 (1912); Lee v. Boykin, 114 S. C. 480, 103 S. E. 777 (1920); Mercantile Bank v. Busby, 120 Tenn. 652, 113 S. W. 390 (1908); *cf.* Pharr v. Stevens, 124 Tenn. 669, 139 S. W. 730 (1911). See also Crawford v. Rawls, 6 La. App. 372 (1927).

18. Long v. Gwin, 202 Ala. 358, 80 So. 440 (1918). See Comment (1925) 11 VA. L. REV. 222.

obvious intent of the statute, and they destroy that hope for uniformity which was its motivating impulse.

Under the statute the nature of the irregular accommodating indorser's undertaking, like that of other accommodating parties, is revealed by the instrument itself.[19] And in the unusual case in which the borrower signs as the irregular indorser with the accommodating party becoming the maker or acceptor, the irregular indorser, while not entitled to presentment and notice,[20] is nonetheless an indorser, and is obligated as such.[21] Presentment and notice are dispensed with in this case only because, as the principal debtor, the irregular indorser — like a regular indorser who is the principal debtor — must be aware that the instrument will not be paid when presented at maturity.[22]

Furthermore, an accommodating party may incur the obligations of an indorser although he does not sign on the back of the instrument.[23] Section 63 provides:

> "A person placing his signature upon an instrument otherwise than as maker, drawer, or acceptor, is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity."

Although this section is much quoted by the courts as fixing the irregular indorser's liability to be that of an indorser,[24] it is, because of Section 64, superfluous in this connection.[25] Its chief utility, at least with regard to the irregular indorser before delivery, is to provide a rule for deciding cases in which the purpose of the accommodating party's signature is controvertible. Thus, where an officer of a corporation places his name on an instrument, he is held to be an indorser, unless it is clear upon the instrument itself that he signed as agent of the corporation maker or drawer.[26] And where the

19. This is criticized by Hening, *The Uniform Negotiable Instruments Law, Is It Producing Uniformity and Certainty in the Law Merchant?* (1911) 59 U. OF PA. L. REV. 471, 532, 551.

20. See N. I. L. §§ 80, 115(3).

21. See Comment (1927) 13 VA. L. REV. 306. See Park Bank v. Naffah, 276 Pa. 199, 119 Atl. 923 (1923); Bergen v. Grimble, 130 Md. 559, 101 Atl. 137 (1917).

22. See BRANNAN, NEGOTIABLE INSTRUMENTS LAW (6th ed. 1938) 865-867.

23. O'Dess v. Gunter, 258 Mich. 667, 242 N. W. 804 (1932); People's Bank v. Penello, 59 Cal. App. 174, 210 Pac. 432 (1922); Germania Nat. Bank v. Mariner, 129 Wis. 544, 109 N. W. 574 (1906). Section 17(6) of the N. I. L. should also be noted: "Where a signature is so placed upon the instrument that it is not clear in what capacity the person making the same intended to sign, he is deemed to be an indorser."

24. See, for example, Deahy v. Choquet, 28 R. I. 338, 67 Atl. 421 (1907); Bradley v. Louisville Food Products Co., 139 Md. 385, 114 Atl. 913 (1921).

25. It is significant that Crawford, who drafted the N. I. L., specifically declares § 64 to have been designed for the irregular indorser, and that he omits any reference to the irregular indorser under § 63. CRAWFORD, ANNOTATED NEGOTIABLE INSTRUMENTS LAW (4th ed. 1916) 124.

26. Eaves v. Keeton, 196 Mo. App. 424, 193 S. W. 629 (1917); Cooper v. Sonk, 201 Mich. 655, 167 N. W. 842 (1918); Steffens v. Sinkey, 43 Ohio App. 355, 183 N. E. 866

accommodating party adds words which are ambiguous or contradictory, Section 63 determines that he is an indorser.[27]

Some courts have gone even further and declared that even where the accommodating party has stated explicitly that he is guaranteeing payment, he is liable as an indorser if he has signed on the back of the instrument.[28] The passion for uniformity need not be carried to such lengths. Unlike the case where the payee guarantees payment to subsequent holders, the signature of an accommodating party before delivery need not be termed an indorsement, since it is the payee's signature, not his, which negotiates the instrument.[29] There seems no reason, therefore, for distorting the accommodator's intent where he has expressed it clearly on the instrument,[30] and Section 63 provides for this kind of case.[31]

To Whom the Irregular Indorser is Liable. Most of the confusion regarding the irregular indorser today may be attributed to the failure of the courts to distinguish between what was and what was not changed by Section 64. The provision that the irregular indorser is liable as an indorser, if at all, was new. But the belief of early commentators on the N.I.L., that the three rules set forth in Section 64 eliminated all presumptions and excluded any need for parol evidence,[32] was an illusion. Instead, these rules only illustrate the con-

(1932), (1933) 7 U. OF CIN. L. REV. 187. But the words of § 64, "not otherwise a party," do not change the rule that a partner indorsing individually is a party different from the partnership and incurs a double liability arising from the two distinct contracts by which he has bound himself. Fourth Nat. Bank v. Mead, 216 Mass. 521, 104 N. E. 377 (1914).

27. In Seabury v. Hungerford, 2 Hill 80 (N. Y., 1841), the defendant added to his signature the word "backer," and was held liable as an indorser. *Cf.* Merchants' Bank v. Raesly, 288 Pa. 374, 136 Atl. 238 (1927); Mangold v. Utterback, 54 Okla. 655, 160 Pac. 713 (1916), 16 COL. L. REV. 429.

28. Douglas v. Rumelin, 125 Ore. 261, 264 Pac. 852 (1928); *cf.* Bradford v. Corey, 5 Barb 461 (N. Y., 1849); Wallrich Land & Lumber Co. v. Ebenreiter, 216 Wis. 140, 256 N. W. 773 (1934). See 2 DANIEL, NEGOTIABLE INSTRUMENTS (7th ed. 1933) §§ 796, 797.

29. See Arant, *The Written Aspect of Indorsement* (1924) 34 YALE L. J. 144. See also Ames, *The Negotiable Instruments Law. A Word More* (1901) 14 HARV. L. REV. 442, 445.

30. The intent must be clearly indicated in the indorsement and cannot be shown by parol evidence. Smardon v. Broussard, 6 La. App. 579 (1927); Busbee v. Creech, 192 N. C. 499, 135 S. E. 326 (1926); First Nat. Bank v. Bickel, 143 Ky. 754, 137 S. W. 790 (1911).

31. The more persuasive cases so hold. Carothers v. Callahan, 207 Ala. 611, 93 So. 569 (1922); Bonart v. Rabito, 141 La. 970, 76 So. 166 (1917); Hibernia Nat. Bank v. Dresser, 132 La. 532, 61 So. 561 (1913); Conn v. Atkinson, 227 Ky. 594, 13 S. W. (2d) 759 (1929); BRANNAN, NEGOTIABLE INSTRUMENTS LAW (6th ed. 1938) 792.

32. Hening, *The Uniform Negotiable Instruments Law, Is It Producing Uniformity And Certainty In the Law Merchant?* (1911) 59 U. OF PA. L. REV. 471, 532; Chafee, *Progress of the Law—Bills And Notes* (1919) 33 HARV. L. REV. 255, 262; NORTON, BILLS AND NOTES (4th ed. 1914) 189-191; (1918) 28 YALE L. J. 187.

tinuing need for parol evidence to determine the parties to whom the irregular indorser is liable.

Thus, Rule 3 constitutes a necessary exception to Rule 1, an exception which is dependent upon the existence of specific facts which can be shown only by extrinsic evidence.[33] An irregular indorsement appearing first on the back of a note, for example, may have been made to give the maker credit with the payee,[34] or to give the payee credit with his transferee.[35] Rule 3 provides that if the irregular indorser signs for the accommodation of the payee, he is not liable to the payee. Yet there is nothing on the ordinary instrument to indicate for whose accommodation he did lend his name.[36] Furthermore, Section 64 is silent regarding the status of an irregular indorser who signs for the accommodation of a holder about to negotiate. Again, only extrinsic evidence can disclose which is the accommodated party.[37] Similarly, where the principal debtor, rather than the accommodating party, becomes the irregular indorser, he is not entitled to notice under Section 115(3); but extrinsic evidence is required to show that he is in fact the principal debtor.[38]

Because of faulty draftsmanship, parol evidence is also needed under Rule 2 to determine to whom the irregular indorser is liable. This was made apparent in *Haddock, Blanchard & Co. v. Haddock*,[39] an early case under the N.I.L. There the lender drew a bill of exchange on the borrower to his own order. Before its acceptance the bill was indorsed in blank by the defendant for the accommodation of the borrower-drawee. Under the terms of Rule 2 the defendant was not liable to the drawer, although it was clear that the drawer agreed to extend credit only because the defendant was willing to back the bill as an indorser. The New York court, realizing the defect in the statute, held that parol evidence was admissible to show that the irregular indorser was liable to the drawer.[40]

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33. See BRANNAN, NEGOTIABLE INSTRUMENTS LAW (6th ed. 1938) 796-797.

34. See, for example, Franklin v. Kidd, 219 N. Y. 409, 114 N. E. 839 (1916).

35. Franco v. Schwartz, 131 Misc. 74, 225 N. Y. Supp. 739 (Sup. Ct. 1928); State Bank v. Pangerl, 139 Minn. 19, 165 N. W. 479 (1917).

36. For a case illustrating the possible difficulty of finding which is the accommodated party, see Perley v. Wing, 82 N. H. 299, 133 Atl. 26 (1926).

37. Hilgemeier v. Bower Mfg. Co., 81 Ind. App. 191, 139 N. E. 691 (1923).

38. Gillam v. Walker, 189 N. C. 189, 126 S. E. 424 (1925); Residence Funding Co. v. Francis, 149 Misc. 380, 268 N. Y. Supp. 239 (Mun. Ct. 1933). *Contra:* Busbee v. Creech, 192 N. C. 499, 135 S. E. 326 (1926), criticized adversely in Comment (1927) 13 VA. L. REV. 306. See also Overland Auto Co. v. Winters, 277 Mo. 425, 210 S. W. 1 (1919).

39. 192 N. Y. 499, 85 N. E. 682 (1908), 19 L. R. A. (N.S.) 136, 22 HARV. L. REV. 300.

40. The error in the statute and the situation presented by the *Haddock* case were foreseen by Ames, *The Negotiable Instruments Law. A Word More* (1901) 14 HARV. L. REV. 442, 446.

Various amendments to Rule 2 have been suggested, designed to circumvent the situation presented by the *Haddock* case,[41] but they have not been widely adopted.[42] Where the instrument is a note the wording of the Rule is sound, and parol evidence need not be admitted. It should be noted, however, that a note within Rule 2 (or a bill within a properly amended Rule 2) does not require parol evidence only because an instrument naming the maker as payee could only be made for the accommodation of the maker. Whenever the payee is a third person, the form of the instrument cannot disclose to whom the irregular indorser is liable.

The Irregular Indorser After Delivery. Before the adoption of the N.I.L. it was part of the prima facie case of a payee seeking to recover against an irregular indorser to prove that the indorsement was placed on the instrument before it was delivered to him.[43] The basis of the requirement was the need for finding some consideration which passed to the irregular indorser[44] upon which his liability could be predicated.[45] The statute preserves the need for a valid consideration[46] by limiting the liabilities created by Section 64 to the irregular indorser before delivery.[47]

Not being covered explicitly by the statute, the status of the irregular indorser after delivery has called up the ghosts of the controversy which

41. It was suggested by Ames, *The Negotiable Instruments Law* (1900) 14 HARV. L. REV. 241, 250, that the first two rules of § 64 be amended to read as follows: "(1) If the instrument is a note or bill payable to the order of a third person, or an accepted bill payable to the order of the drawer, he is liable to the payee and to all subsequent parties. (2) If the instrument is a note or unaccepted bill payable to the order of the maker or drawer, or payable to bearer, he is liable to all parties subsequent to the maker or drawer." See also Brannan, *Some Necessary Amendments to the Negotiable Instruments Law* (1913) 26 HARV. L. REV. 588, 589.

42. Only Illinois, Virginia, and West Virginia have adopted the amendments advised by Ames. See BRANNAN, NEGOTIABLE INSTRUMENTS LAW (6th ed. 1938) 37.

43. Barnes v. Van Keuren, 31 Neb. 165, 47 N. W. 848 (1891); Anderson v. Norvill, 10 Ill. App. 240 (1881); see (1913) 44 L. R. A. (N.S.) 481.

44. It has never been clear whether the nature of this consideration consisted of the value transferred from the lender to the borrower, or whether it was the borrower's promise to save the irregular indorser harmless if he should have to take up the instrument. Compare Carr v. Wainwright, 43 F. (2d) 507 (C. C. A. 3d, 1930) with Murphey v. Illinois Trust & Sav. Bank, 57 Neb. 519, 77 N. W. 1102 (1899).

45. The statement in 1 DANIEL, NEGOTIABLE INSTRUMENTS (6th ed. 1913) 713, that at common law a presumption existed that the indorsement was made before delivery, is very questionable. See Marienthal v. Taylor, 2 Minn. 147 (1858).

46. Ladd v. Anderson, 89 S. W. (2d) 1041 (Tex., 1935); Kahn v. Waldman, 283 Mass. 391, 186 N. E. 587, 88 A. L. R. 699 (1933); Northern Trust Co. v. Ellwood, 200 Iowa 1213, 206 N. W. 256 (1925), (1926) 12 IOWA L. REV. 69; Jackson v. Lancaster, 213 Ala. 97, 104 So. 19 (1925).

47. Kohn v. Consolidated Butter & Egg Co., 30 Misc. 725, 63 N. Y. Supp. 265 (Sup. Ct. 1900). And it remains part of the plaintiff's prima facie case to prove that the indorsement was made before delivery. Bender v. Bahr Trucking Co., 144 App. Div. 742, 129 N. Y. Supp. 737 (1911); Kimball State Bank v. Kimball Mills, 55 S. D. 551, 226 N. W. 757 (1929).

formerly centered around the irregular indorser before delivery, and the courts have variously called him a guarantor,[48] a joint maker,[49] and an indorser.[50] Uniformly, however, they have admitted parol evidence to show the scope of his undertaking. Where the evidence discloses that, although made after the delivery to the lender, the indorsement was part of the agreement by which the lender agreed to extend credit and that the irregular indorser should therefore be liable to the lender, the better rule is that the indorsement relates back to the time of the making of the instrument.[51] In this case a valid consideration clearly passes, and the irregular indorser is properly treated exactly as though he had indorsed before delivery.[52] More commonly, however, the evidence reveals an intent to accommodate the lender, in dealing with his transferee,[53] and this gives rise to the problem of determining in what capacity the irregular indorser after delivery shall be bound.

Most courts have endeavored to bring this situation within Section 64.[54] To do so it is necessary to hold that each indorsement creates a new instrument, with the original payee becoming the "maker" and his indorsee becoming the "payee"; hence, the irregular indorser signs before the "new instrument" is delivered to the "new payee" and is duly liable to him. If the original payee transfers the instrument by a special indorsement, the case falls within Rule 1 of Section 64. And if he transfers it by an indorsement in blank, the "new instrument" is payable to the bearer, and the case comes within Rule 2, which makes the irregular indorser liable to the bearer.[55]

The catch-all terms of Section 63 offer a more forthright solution. Just as Section 64 applies to the irregular indorser before delivery, the argument runs, so Section 63 determines that the irregular indorser after delivery is liable as an indorser.[56] And by analogy to Section 64, parol evidence may

48. Kahn v. Waldman, 283 Mass. 391, 186 N. E. 587 (1933); Gursky v. Rosenberg, 105 Cal. App. 410, 287 Pac. 575 (1930); Loveland v. Sigel-Campion Live Stock Co., 77 Colo. 22, 234 Pac. 168 (1925); Cripple Creek State Bank v. Rollestone, 70 Colo. 434, 202 Pac. 115 (1921).

49. Babel v. Ransdell, 294 S. W. 734 (Mo. 1927); Ryan v. Security Savings Bank, 271 Fed. 366 (App. D. C. 1921).

50. Thomas v. Hoebel, 46 Idaho 744, 271 Pac. 931 (1928); Morris C'ty Brick Co. v. Austin, 79 N. J. L. 273, 75 Atl. 550 (1910); Harris v. Patterson, 138 Okla. 57, 280 Pac. 434 (1929); Alexander v. Young, 65 F. (2d) 752 (C. C. A. 10th, 1933).

51. Baggish v. Offengand, 97 Conn. 312, 116 Atl. 614 (1922); Burton v. McCaskill, 79 Fla. 173, 83 So. 919 (1920); Downey v. O'Keefe, 26 R. I. 571, 59 Atl. 929 (1905); Pearl v. Cortwright, 81 Miss. 300, 33 So. 72 (1902).

52. Krumm v. El Reno State Bank, 83 Okla. 177, 201 Pac. 364 (1921).

53. See, for example, Goodman v. Gaull, 244 Mass. 528, 138 N. E. 910 (1923).

54. See, for example, Kimball State Bank v. Kimball Mills, 55 S. D. 551, 226 N. W. 757 (1929).

55. Or the holder may convert the blank indorsement into a special indorsement and thus bring the case within § 64(1). See N. I. L. § 35.

56. Thomas v. Hoebel, 46 Idaho 744, 271 Pac. 931 (1928); Morris C'ty Brick Co. v. Austin, 79 N. J. L. 273, 75 Atl. 550 (1910).

be admitted to show to whom he is liable. This reaches the desired result without allowing parol evidence under a rule which was intended to exclude it.

The Irregular Indorser's Warranties. The irregular indorser, because he undertakes the obligations of the ordinary indorser, is liable not only on his broad engagement to pay if the instrument is dishonored at maturity and he is duly notified; he may also be held on the general warranties imputed to every indorser by Section 66.[57] To some it has seemed an anomaly that an accommodation party could warrant anything,[58] but much of the difficulty disappears when it is understood that this is only an affirmative way of saying that he is estopped to deny the matters enumerated in Section 66.[59] The principal effect of the warranties is to prevent the indorser from setting up as a personal defense any defect in the original contract as embodied in the instrument,[60] although they also give the holder an alternative cause of action

57. By § 66 and the warranties adopted from § 65, every indorser warrants that: (1) the instrument is genuine and in all respects what it purports to be; (2) he has good title to it; (3) all prior parties had capacity to contract; (4) the instrument is at the time of his indorsement valid and subsisting. "And, in addition, he engages that on due presentment, it shall be accepted or paid . . . and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser, who may be compelled to pay it." It is obviously impossible, however, for an irregular accommodation indorser to warrant that he has good title to the instrument.

58. Ames, *The Negotiable Instruments Law* (1900) 14 HARV. L. REV. 241, 250-251. Brewster acknowledged that § 66 "does make a change in the law, but it is in the line of aiding negotiability," Brewster, *A Defense of the Negotiable Instruments Law* (1900) 10 YALE L. J. 84, 94.

59. McKeehan, *The Negotiable Instruments Law* (1902) 50 AM. L. REG. (o.s.) 561, 567. The English courts have always used the "estoppel" rather than the "warranty" argument. *Ex parte* Clark, 3 Brown C. R. 238 (1791); Thicknesse v. Bromilow, 2 Gr. & J. 425 (1832); Burchfield v. Moore, 23 L. J. Q. B. 261 (1854). See BIGELOW, BILLS, NOTES AND CHECKS (3d ed. 1928) §§ 299-302. And under the Bills of Exchange Act the indorser "engages" that the bill will be accepted and paid, etc., and "is precluded from denying" the genuineness of the bill, etc. See B. E. A. § 55. The cases are collected in BYLES, BILLS OF EXCHANGE (20th ed. 1939).

60. Myrtilles v. Johnson, 124 Conn. 177, 199 Atl. 115 (1938); Segar v. Ocean Ave. Realty Corp., 127 Misc. 805, 217 N. Y. Supp. 471 (Sup. Ct. 1926), 26 COL. L. REV. 1035; Packard v. Windholz, 88 App. Div. 365, 84 N. Y. Supp. 666 (1903). But see Susquehanna Valley Bank v. Loomis, 85 N. Y. 207 (1881); Atlas Coal Co. v. Kentucky River Coal Co., 253 Ill. App. 475 (1929). The cases are collected in BRANNAN, NEGOTIABLE INSTRUMENTS LAW (6th ed. 1938) 813-828.

As to a surety's right to set off his principal's claims against the debtor, see Arant, *Claims Against the Debtor As Defenses To The Surety* (1930) 29 MICH. L. REV. 135; Levine, *The Principal's Warranty And Offset Claims Against the Creditor As Defenses To The Surety* (1931) 30 MICH. L. REV. 197. See also Clark Car Co. v. Clark, 48 F. (2d) 169 (C. C. A. 3d, 1931); Walker v. Traylor Mfg. Co., 12 F. (2d) 382 (C. C. A. 8th, 1926); Coffelt v. Wise, 62 Ind. 451 (1878); Gillespie v. Torrance, 25 N. Y. 306 (1862).

against the indorser.[61] Thus, where an irregular indorser is sued by the holder of a note, proof that the maker's signature was forged does not constitute a valid defense for the indorser.[62]

The more important problem peculiar to the irregular indorser in connection with warranties is whether the provision of Section 66, that the warranties run to "all subsequent holders in due course,"[63] excludes the payee of a note or bill, so that the irregular indorser may use against him real defenses which are available to the maker or drawer. The irregular indorser is, of course, liable on his broad engagement to pay whether or not the payee is a holder in due course, but it is sometimes held that since the instrument has not been negotiated to him, the payee cannot be a holder in due course. Consequently the irregular indorser is not liable to him on a warranty basis,[64] and cannot be sued by him until the date of maturity. Such a result, based on the shadowy and controversial concept of "holder in due course,"[65] is exceedingly dubious in view of the express affirmation of Section 64 that an irregular indorser is liable as an indorser. It ignores the fact that for all practical purposes the payee stands in the same relation to the irregular indorser as a subsequent holder in due course stands to the ordinary indorser.[66]

Wiser courts have held that the issuance of the instrument to the payee constitutes a sufficient negotiation, and the definition of "holder in due course," found in Section 52, in no way contradicts such an interpretation.[67] Section 52, however, does require that a holder, to be a holder in due course, must be "without notice of any infirmity in the instrument." Thus, one who agrees to extend credit only on condition that he be made the payee of a note bearing a usurious rate of interest cannot be a holder in due course able

61. BIGELOW, BILLS, NOTES AND CHECKS (3d ed. 1928) § 299. The indorser may be held for breach of warranty although there has been neither presentment nor seasonable notice. Turnbull v. Bowyer, 40 N. Y. 456 (1869).

62. Security Trust Co. v. Giglio, 132 Atl. 651 (N. J., 1926); Shepherd v. Mortgage Security Corp., 139 Va. 274, 123 S. E. 553 (1924); See also President of Bank v. Davis, 36 Mass. 373 (1837).

63. Ames said the idea that an indorser is liable to any one but his immediate transferee "is an original invention of the Negotiable Instruments Law." Ames, *The Negotiable Instruments Law* (1900) 14 HARV. L. REV. 241, 251. But see McKeehan, *The Negotiable Instruments Law* (1902) 50 AM. L. REG. (o.s.) 561, 565-568.

64. Gate City Nat. Bank v. Bunton, 316 Mo. 1338, 296 S. W. 375 (1927); Walker v. Traylor Mfg. Co., 12 F. (2d) 382 (C. C. A. 8th, 1926); Farmers State Bank v. Mowry, 107 Okla. 275, 232 Pac. 26 (1924); Southern Nat. Life Co. v. People's Bank, 178 Ky. 80, 198 S. W. 543 (1917); Vander Ploeg v. Van Zuuk, 135 Iowa 350, 112 N. W. 807 (1907).

65. Moore, *The Rights of a Remitter of a Bill or Note* (1920) 20 COL. L. REV. 749. See Britton, *The Payee as a Holder in Due Course* (1934) 1 U. OF CHI. L. REV. 728.

66. See Johnston v. Knipe, 260 Pa. 504, 105 Atl. 705 (1918).

67. Liberty Trust Co. v. Tilton, 217 Mass. 462, 105 N. E. 605 (1914); McDonough v. Cook, 19 Ont. L. Rep. 267 (1908).

to hold the irregular indorser for breach of warranty,[68] since he must know that a usurious note may be void.[69] But this creates no inconsistency, since the same rule applies to a subsequent holder seeking to recover from the ordinary indorser who negotiated the instrument to him.[70]

Other courts, reluctant to call the initial issuance of an instrument tantamount to a negotiation, have pointed out that while the warranties of Section 66 run to "all subsequent holders in due course," they do not run only to them.[71] This is an equally satisfactory theory on which to hold the irregular indorser liable to the payee, but it necessitates the use of an estoppel argument to prevent the payee who knows of the defect at the time he accepts the instrument from enjoying a greater protection than the subsequent holder.

Order of Liability. The rule of Section 68 that "indorsers are liable prima facie in the order in which they indorse" applies to irregular indorsers;[72] and, like ordinary indorsers, they may introduce evidence to show a contrary agreement among themselves.[73] Moreover, a sufficient agreement among two or more irregular indorsers that they shall be jointly liable may be found from the circumstances under which they signed,[74] although it is not enough that each knew that the other was signing for the accommodation of the same person.[75]

The unfortunate wording of the second sentence of Section 68 gives rise to the more serious problems arising under this Section. The provision that "joint payees or joint indorsees who indorse are liable jointly and severally" excludes joint accommodating indorsers and strongly implies that they are liable only jointly.[76] Why the common law rule should have been changed for all except joint accommodating indorsers is enigmatic,[77] although the

68. Sedbury v. Duffy, 158 N. C. 432, 74 S. E. 355 (1912); Bruck v. Lambeck, 63 Misc. 117, 118 N. Y. Supp. 494 (City Ct. 1909); Burke v. Smith, 111 Md. 624, 75 Atl. 114 (1909); *cf.* Moffett v. Bickle, 21 Gratt. 280 (Va., 1871). See also Sabine v. Paine, 223 N. Y. 401, 119 N. E. 849 (1918), holding that a usurious instrument is void.

69. But where a subsequent holder, without notice of the instrument's infirmity, brings suit, the instrument is valid. McNeill v. Lilly, 82 F. (2d) 620 (App. D. C. 1935); Wachovia Nat. Bank v. Crafton, 181 N. C. 404, 107 S. E. 316 (1921).

70. See BRANNAN, NEGOTIABLE INSTRUMENTS LAW (6th ed. 1938) 574-583.

71. *Id.* 815.

72. Blumberg v. Speilberger, 209 Ala. 278, 96 So. 191 (1923); Noble v. Beeman-Spaulding-Woodward Co., 65 Ore. 93, 131 Pac. 1006, 46 L. R. A. (N.S.) 162 (1913). See CRAWFORD, ANNOTATED NEGOTIABLE INSTRUMENTS LAW (3d ed. 1908) 92.

73. Witteman v. Sands, 238 N. Y. 434, 144 N. E. 671 (1924), (1925) 38 HARV. L. REV. 391; Wilson v. Hendee, 74 N. J. L. 640, 66 Atl. 413 (1907); Prestenback v. Mansur, 14 La. App. 429, 125 So. 310 (1929).

74. Quackenboss v. Harbaugh, 298 Mo. 240, 249 S. W. 940 (1923); Trego v. Est. of Cunningham, 267 Ill. 367, 108 N. E. 350 (1915); Weeks v. Parsons, 176 Mass. 570, 58 N. E. 157 (1900); *cf.* Emmons v. Deorgin, 125 Me. 485; 135 Atl. 98 (1926); Jaronko v. Czerwinski, 117 Conn. 15, 166 Atl. 388 (1933).

75. *In re* McCord, 174 Fed. 72 (S. D. N. Y. 1909).

76. Case v. McKinnis, 107 Ore. 223, 213 Pac. 422, 32 A. L. R. 167 (1923); *cf.* Williams v. Paintsville, 143 Ky. 781, 137 S. W. 535 (1911).

77. See Comment (1925) 11 CORN. L. Q. 57.

rule possesses some virtues. It protects the irregular indorser who was not notified from being deprived of the privileges of the transferor indorser, including the right to notice.[78] It likewise prevents the one joint indorser who did get notice from being obligated to pay the whole amount.[79] But the effect of Section 68 is to create an unwelcome distinction between the irregular and the transferor indorser. Even more important is the notable unfairness of the rule to the innocent holder for value who, being unable to tell from the form of the instrument that the several indorsers are joint accommodating parties, gives notice only to the one on whose credit he had relied and unwittingly discharges all.[80] Equally unjust is the corollary that where one of two joint accommodation indorsers waives notice, both are discharged if notice is not given the other.[81]

A solution is suggested by Section 107, which allows a joint accommodation indorser who receives notice the same time for giving notice to his co-indorsers as the holder has after the dishonor.[82] If, therefore, the implication of Section 68—that joint irregular indorsers are liable only jointly—be disregarded, the irregular indorser who is given notice is enabled to obtain a proportionate contribution from his co-indorsers by notifying them. They in turn receive the notice to which they are entitled as indorsers. And at the same time the innocent holder is relieved from the unreasonable burden of having to discover whether the indorser upon whose credit he relied is in fact one of several joint indorsers.[83]

Conclusion. The sections of the N.I.L. which deal with the irregular indorser have not escaped astute criticism from those who are ever ready with suggestions for amending the statute. A larger portion of the blame for the present lack of uniformity, however, must rest upon those courts that have failed to find in the present statute a workable framework upon which they might build the rules for deciding specific cases. The cases recognizing the character of the irregular indorser's undertaking offer ample proof that such a framework is provided by the statute in its present form.

78. But see Owens v. Grenlee, 68 Colo. 114, 188 Pac. 721 (1920).

79. See Blair v. Wells, 156 Ark. 470, 246 S. W. 498 (1923).

80. See discussion in Case v. McKinnis, 107 Ore. 223, 213 Pac. 422, 32 A. L. R. 167 (1923).

81. First Nat. Bank of Ludington v. Michigan-Ark. Oil Corp., 231 Mich. 597, 204 N. W. 719 (1925), (1926) 12 IOWA L. REV. 175. As to what constitutes a waiver, see, for example, Glidden v. Chamberlain, 167 Mass. 486, 46 N. E. 103 (1897); Whitney v. Chadsey, 216 Mich. 604, 185 N. W. 826 (1921); Bank of Montpelier v. Montpelier Lumber Co., 16 Idaho 730, 102 Pac. 685 (1909).

82. Section 107 provides: "Where a party receives notice of dishonor, he has, after the receipt of such notice, the same time for giving notice to antecedent parties that the holder has after the dishonor."

83. Hurlbut v. Quigley, 180 Cal. App. 265, 180 Pac. 613 (1919); Shea v. Vahey, 215 Mass. 82, 102 N. E. 119 (1913); see Enterprise Co. v. Canning, 210 Mass. 285, 96 N. E. 673 (1911).